

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DANIEL GRELLNER, individually
and doing bussiness as Venacore, Inc.,

Plaintiff,

v.

RODNEY D. RAABE, SAPHEON
INC., SAPHEON LLC, COVIDIEN
HOLDING INC., COVIDIEN LP,
COVIDIEN SALES LLC,

Defendants.

No. 2:15-CV-0189-SMJ

**ORDER DENYING MOTION TO
DISMISS**

Before the Court, with oral argument, is Defendant's Motion to Dismiss. ECF No. 52. Having reviewed the pleadings and the file in this matter, the Court is fully informed and denies Defendant's motion.

I. Factual Background¹

Plaintiff Grellner first met Defendant Raabe at a trade show in 1999. As early as July 2005, Grellner conceived VeinBond. VeinBond is described in detail in the FAC as, among other things, a method designed to treat persons with

¹ The "factual background" section is based on the Complaint's, ECF No. 1, and Amended Complaint's, ECF No. 8, factual allegations, which are assumed true at this time, *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

1 varicose veins that utilizes an *in vivo* delivery method such as a gun-like device
2 connected to a catheter to inject medical glue into the veins.

3 The FAC asserts that Grellner and Raabe entered into a verbal agreement in
4 April 2008 wherein Raabe orally agreed to be Grellner's partner, co-founder, and
5 Chief Medical Advisor of Venacore. The FAC alleges that this agreement was
6 ratified by a written and signed July 11, 2008 agreement, attached as Exhibit 1 to
7 the FAC. Plaintiff claims that pursuant to this alleged partnership Defendant
8 Raabe "began to learn every detail of Plaintiff's Technology and Intellectual
9 Property," and allegedly stole Grellner's intellectual property related to the
10 VeinBond Varicose Vein System.

11 II. Dismissal Standards

12 A Rule 12(b)(6) motion to dismiss for failure to state a claim questions
13 whether the plaintiff's claims satisfy Rule 8(a)'s pleading standards. *Navarro v.*
14 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Rule 8 requires the complaint to contain
15 "a short and plain statement of the claim showing that the pleader is [plausibly]
16 entitled to relief." Fed. R. Civ. P. 8(a)(2); *see Bell Atl. Corp. v. Twombly*, 550 U.S.
17 544, 570 (2007) (setting forth the plausibility standard). Plausibility does not
18 require a probability of success on the merits; instead it requires "more than a
19 sheer possibility" of success on the merits. *Ashcroft v. Iqbal*, 556 U.S. 662, 678
20 (2009). To determine whether the complaint contains a statement showing that the

1 pleader is plausibly entitled to relief, the court first identifies the elements of the
2 plaintiff's claim and then determines whether those elements can be proven on the
3 alleged facts. *Id.* at 663. When conducting this analysis, the court accepts the
4 alleged factual allegations in the complaint as true and construes the pleadings in
5 the light most favorable to the plaintiff. *Id.*

6 III. Analysis

7 Defendant argues that Plaintiff's complaint is insufficiently plead for three
8 primary reasons: (1) there was no breach of a fiduciary duty because no
9 partnership ever exists, (2) a contract was never formed between the parties,
10 (3) VeinBond is not a trade secret because of a prior patent application.

11 The Court finds the FAC's claims are sufficiently plead, and met the
12 plausibility standard established in *Iqbal*.

13 A. Partnership Formation

14 Defendant argues that the parties never entered into a partnership because
15 the parties instead contemplated an "at-will" advisory role.

16 Indeed, the 2008 written agreement between Grellner and Raabe includes
17 language that may suggest that the parties intended to create an advisory role that
18 was "at will". ECF No. 9, Exh. 1 ("Your role as an Advisor is for no specified
19 period and is completely "at will". As a result, you are free to terminate the
20 relationship at any time, for any reason, or for no reason. Similarly, the Company

1 is free to terminate the relationship with you at any time, for any reason, or for no
2 reason.”)

3 Defendant argues this language proves that Dr. Raabe was to be an “at-will”
4 advisor who would be compensated for services to be provided to a corporation,
5 “Venacore, Inc.”— not a partner in a partnership.

6 Conversely, Plaintiff alleges that the parties intended Defendant to be a
7 physician advisor and partner. Plaintiff alleges that he and Defendant Raabe
8 verbally agreed at a 2008 meeting that Defendant Raabe would join Venacore as a
9 partner, co-founder, and chief medical advisor. He also alleges that Defendant
10 Raabe conducted himself as a partner—by making presentations on the
11 corporation’s behalf and putting himself out to others as part-owner of the
12 corporation.

13 Under Washington law, a partnership is formed by “the association of two
14 or more persons to carry on as co-owners a business for profit.” RCW §
15 25.05.055(1). It is well established law that partnerships may be formed regardless
16 of whether a person intended to form a partnership. RCW §25.05.055(1).
17 Existence of a partnership depends on fact questions. *Stipich v. Marinovich*, 13
18 Wn.2d 155, 159-60 (1942).

19 Whether two people have entered into a partnership is a fact intensive
20 inquiry, and the Defendant’s arguments are more appropriately made a summary

1 judgment stage. At this stage in the litigation, Grellner has plead enough to find
2 that it was plausible that the parties entered into a partnership. And a seemingly-
3 contrary contract between the parties does not foreclose the possibility of the
4 parties entering into a verbal partnership.

5 Defendant's motion is denied on this ground.

6 **B. Contract Formation**

7 Defendant argues that the FAC fails to plead the existence of a valid
8 contract because there was not valid consideration. Defendant contends that the
9 FAC establishes a lack of consideration because payment was to be in the form of
10 stock in an unformed company.

11 A valid contract, written or oral, requires an offer, acceptance, and
12 consideration. *Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 50 (2002).
13 The Court finds that there was a valid contract. Without authority, Defendants
14 argue that shares of stock in an unformed company cannot be consideration. This
15 misstates the consideration exchanged, which was Grellner's *promise* to
16 "recommend to the Board of Directors...that the Company grant [Raabe] 449,500
17 shares of restricted Common Stock." Moreover, Defendants' argument concerns
18 the "adequacy of consideration," which courts do not generally consider.
19 *Columbia Basin*, 1999 Wash. App. LEXIS 2021, at *16 (holding courts evaluate
20

1 consideration for “legal sufficiency” which is “concerned not with comparative
2 value but with that which will support a promise”).

3 The Defendant’s motion is denied on this ground.

4 **C. Trade Secret**

5 Defendant argues that Plaintiff cannot allege any claims based on trade
6 secret because no protectable secret existed.

7 A plaintiff asserting a trade secret claim bears the burden of “proving that
8 legally protectable secrets exist.” *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38,
9 50 (1987). Washington State defines a trade secret in relevant part as information
10 that “[d]erives independent economic value, actual or potential, from not being
11 generally known to, and not being readily ascertainable by proper means by, other
12 persons.” RCW § 19.108.010(4). In other words, a trade secret must be a secret
13 that is valuable because it is a secret.

14 Thus, to be a protectable trade secret, Plaintiff’s Vein Bond invention must
15 derive independent economic value from not being generally known or readily
16 ascertainable by proper means. RCW § 19.108.010(4)(a).

17 Defendant contends that there was no protectable secret because the
18 information was publically disclosed by March 9, 2006 in the Mirizzi Publication.
19 ECF No. 9, Exh. 2.

1 To resolve the issues of whether the Mirizzi Publication forecloses
2 Plaintiff's trade secret claim the Court would need to engage in an intensive
3 factual inquiry. The Court would need to, for instance, compare patent applications
4 to Plaintiff's Vein Bond invention. This would likely require expert testimony.
5 This level of inquiry is clearly beyond the scope of a motion to dismiss on
6 12(b)(6) grounds.

7 The Defendant's motion is denied on this ground.

8 **D. Additional Arguments**

9 Beyond Defendant's three main arguments, Defendant also argues that the
10 following claims should be dismissed: fraud; correction of inventorship; and
11 tortious interference with contract.

12 *Fraud:* Plaintiff sufficiently alleges fraud. Plaintiff alleges that he acted on
13 Raabe's presentations that he would assign all intellectual property that was useful
14 to Venacore. Plaintiff alleges that Raabe made this representation with the
15 knowledge that he never intended to do so, and knowing that he actually intended
16 to steal Plaintiff's intellectual property instead. A promise of future performance
17 is fraudulent if made without the intent to preform it. *Mastaba, Inc. v. Lamb*
18 *Westin Sales, Inc.*, 23 F.Supp. 3d 1283, 1293 (E.D. Wash. 2014). Plaintiff's
19 allegations meet the standard for pleading at his point in the litigation.

1 *Correction of inventorship*. Plaintiff sufficiently alleges this claim. At this
2 stage in the litigation Plaintiff is not requires to plead with the level of specificity
3 that Defendants seek.

4 *Tortious interference*. Defendant argues that Plaintiff's tortious interference
5 claim against Sapehon fails because there is no partnership, no valid contract, and
6 no trade secret. Because we have determined that Plaintiff sufficiently alleged
7 these claims, this argument also fails.

8 Accordingly, **IT IS HEREBY ORDERED:** Defendant's Motion to
9 Dismiss, **ECF No. 52**, is **DENIED**.

10 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order
11 and provide copies to all counsel.

12 **DATED** this 15th day of July 2016.

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SALVADOR MENDOZA, JR.
United States District Judge